IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 169 of 1997
with
CRIMINAL APPEAL No 170 of 1997
with
CRIMINAL APPEAL No. 625 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

ZINABHAI CHATURBHAI VASAVA

Appearance:
CRIMINAL APPEALS No. 169/97 & 170/97
MR RM CHAUHAN,APP for the State
MR NAVIN PAHWA, Advocate for the respondents-accused
CRIMINAL APPEAL NO. 625/97
MR NAVIN PAHWA, Advocate for the appellants-accused
MR RM CHAUHAN, APP for the respondent-State

CORAM : MR.JUSTICE J.M.PANCHAL

and

MR.JUSTICE J.R.VORA

Date of decision: 09/01/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE J.M.PANCHAL)

On a trial held by the learned Additional Sessions Judge, Bharuch, in Sessions Case No. 205/95, the five respondents in Criminal Appeal No. 170/97 were prosecuted of the offences punishable under sections 147, 148, 149, 302 & 504 of the Indian Penal Code as well as section 135 of the Bombay Police Act. The learned Additional Sessions Judge has convicted the respondents no.1 & 2 of the offences punishable under section 304 Part-I read with section 34 of the Indian Penal Code as well as section 135 of the Bombay Police Act and punished them with R.I. for 4 years and fine of Rs. 1000/-, in default S.I. for six months, but acquitted the respondents no.3 to 5 of the offences with which they were charged, by judgment dated December 31, 1996. In Criminal Appeal No.170/97, the State of Gujarat has questioned acquittal of all the five respondents of the offences punishable under sections 147, 148, 149, 302 & 504 of the Indian Penal Code; whereas in Criminal Appeal No. 169/97, the case of the State of Gujarat is that maximum punishment provided under the law ought to have been imposed on the respondents no.1 & 2 for commission of the offences punishable under section 304 Part-I read with section 34 of the Indian Penal Code and section 135 of the Bombay Police Act. Thus, Criminal Appeal No. 169/97 is filed under section 377 of the Code of Criminal Procedure, 1973 for enhancement of sentence imposed on the respondents no.1 & 2. The respondents no.1 & 2 in Criminal Appeal No. 170/97 have filed Criminal Appeal No. 625/97 and questioned the legality of judgment by which they have been convicted of the offences punishable under section 304 Part-I read with section 34 of the Indian Penal Code and section 135 of the Bombay Police Act as well as imposition of sentence on them. All the three appeals arise out of the common judgment dated December 31, 1996 rendered by the learned Additional Sessions Judge, Bharuch, in Sessions Case No. 205/95. As common questions of facts and law arise for our consideration in these appeals, we propose to dispose them of by this common judgment.

2. Deceased Ganpatbhai was a resident of village Bamalla, Taluka : Jhagadia, District : Bharuch. He was cultivating the field belonging to one Patel on crop

share basis with the help of a labourer. The incident in question took place on August 22, 1995. On the date of the incident, the deceased in the company of labourer Laljibhai Mansingbhai had gone to the field known as 'savlivala' for the purpose of ploughing the same and worked upto 12.00 noon. Shardaben, wife of deceased Ganpatbhai, had brought meals for both of them and after taking meals, they had again started ploughing the land. Shardaben was also working in another part of the field. Meanwhile, Shardaben had seen that the respondents no.1 & 2 in Criminal Appeal No. 170/97 were coming towards deceased Ganpatbhai with dharias in their hands and were accompanied by the respondents no.2 to 5 in Criminal Appeal No.170/97. On seeing the respondents no.1 & 2 coming with deadly weapons in their hands, Shardaben had immediately rushed towards her husband and entreated him to leave the place immediately, as she had apprehended assault on her husband. However, before the deceased could leave the field, the respondents in Criminal Appeal No.170/97 had come to the place where the deceased was working and the respondents no.1 & 2 had started grappling with him. It is the case of the prosecution that thereafter the respondent no.1 in Criminal Appeal No.170/97 had inflicted dharia blows on both the hands of the deceased, whereas the respondent no.2 in Criminal Appeal No.170/97 had inflicted dharia blows on the legs of the deceased and rest of the respondents instigated the respondents no.1 & 2 to kill the deceased. Because of the injuries, the deceased had fallen down and died within 10 to 15 minutes because of profuse bleeding which had taken place due to the injuries. While her husband was being assaulted, Shardaben had raised shouts and, therefore, those who were working in the nearby fields, had also come to the place of the incident. According to the prosecution, the deceased was also discharging duties as a watchman for the purpose of protecting crops standing in the fields and as he had impounded cattle belonging to the respondents no.1 & 2, they were infuriated and, therefore, they had assaulted the deceased. Meanwhile, someone had informed the police about the incident and, therefore, police had gone to the field where the incident had taken place at about 6.00 P.M. At the field, complaint filed by Shardaben was recorded and C.R.No.84/95 was registered against the five respondents of the offences punishable under sections 302, 147, 148, 149 & 504 of the Indian Penal Code and section 135 of the Bombay Police Act. The case was investigated by Mr. D.H.Rathod, who was then P.S.I. at Umalla Police Station. The Investigating Officer had held inquest on the dead body of the deceased and made arrangement for sending dead body to the hospital for

postmortem examination. The panchnama of place of occurrence was prepared by the Investigating Officer in presence of independent witnesses and the weapons used by the respondents no.1 & 2 in commission of the offences were also recovered from the house of the respondent no.1. The incriminating articles, which were recovered and seized during the course of investigation, were sent to Forensic Science Laboratory for the purpose of analysis. On receipt of report from Forensic Science Laboratory and at the conclusion of investigation, the five respondents in Criminal Appeal No. 170/97 were chargesheeted of the offences punishable under sections 147, 148, 149, 302 & 504 I.P.C. and section 135 of the Bombay Police Act in the Court of learned J.M.F.C. Jhagadia. As the offence punishable under section 302 I.P.C. is exclusively triable by the Court of Sessions, the case was committed to Sessions Court, Bharuch for trial, where it was numbered as Sessions Case No. 205/95. The charge at Exh.6 was framed by the learned Additional Sessions Judge against the five respondents of the offences punishable under sections 147, 148, 149, 302, 504 I.P.C. and section 135 of the Bombay Police Act. The charge was read over and explained to the respondents, who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined; (1) Dr. Shankerbhai Nanubhai Barot, PW 1 Exh.16 (2) Shardaben Ganpatbhai, PW.2 Exh.21, (3) Laljibhai Mansing, PW.3 Exh.22, (4) Manilal Kalidas, PW.4 Exh.23, (5) Chhatrasinh Narsinhbhai, PW.5 Exh.24, (6) Somabhai Vadiyabhai, PW.6 Exh.25, and (7) Dalpatsinh Hamirsinh Rathod, PW.7 Exh.38, to prove its case against the respondents. The prosecution also produced documentary evidence, such as, postmortem notes of the deceased prepared by Dr. Shankerbhai at Exh.18, inquest panchnama at Exh.26, different arrest panchnamas of the respondents, report of Serologist, complaint filed by Shardaben etc. in support of its case against the respondents. On behalf of the respondents, two witnesses were examined as defence witnesses viz. (1) Vinaychandra Lallubhai Patel, DW.1 Exh.42, and (2) Mukesh Dhirajlal Doshi, DW.2 Exh.46. After recording of evidence of the prosecution witnesses was over, the learned Judge had explained to the respondents the circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further statements as required by section 313 of the Code of Criminal Procedure. In their further statements, the respondents had denied the case of the prosecution.

3. On appreciation of evidence adduced by the parties, the learned Judge held that it was proved by the

prosecution beyond reasonable doubt that the deceased had died a homicidal death. The learned Judge was of the view that before recording of the complaint of Shardaben, somebody had informed the police about the incident and the police had come to the field and, therefore, the complaint filed by Shardaben was not admissible as F.I.R., but was a previous statement of witness Shardaben recorded during the course of investigation. The learned Judge considered the evidence of witness Shardaben, witness Laljibhai,witness Manilal as well as witness Chhtrasinh and concluded that their evidence was trustworthy, reliable and inspiring confidence against the respondents no.1 & 2 in Criminal Appeal No.170/97, but no case was made out by the prosecution against the respondents no.3 to 5 at all. Placing reliance on the sworn testimonies of the above referred to witnesses, the learned Judge held that it was proved by the prosecution beyond reasonable doubt that the respondent no.1 had caused injuries on both the hands of the deceased by means of dharia, whereas the respondent no.2 had also caused injuries on the legs of the deceased by means of dharia. The learned Judge thereafter considered the nature of the offence committed by the respondents no.1 & 2. The learned Judge was of the view that no injury was inflicted either by the respondent no.1 or by the respondent no.2 on the vital part of the body of the deceased and, therefore, it was difficult to come to the conclusion that the respondents no.1 & 2 had intention to cause death of the deceased. In that view of the matter, the learned Judge held that the offence committed by the respondents no.1 & 2 would not fall under section 300 I.P.C. but would be punishable under Part-I of Section 304 I.P.C. It was found by the learned Judge that the respondents no.1 & 2 had carried and used dharias contrary to the notification promulgated by the competent authority under section 37 of the Bombay Police Act and, therefore, they were also liable to be convicted of the offence punishable under section 135 of the Bombay Police Act. In view of the above-referred to conclusions, the learned Judge, by judgment dated December 31, 1996 has convicted the respondents no.1 & 2 in Criminal Appeal No. 170/97 of the offences punishable under section 304 Part-I read with section 34 I.P.C. as well as section 135 of the Bombay Police Act and punished them with R.I. for 4 years and fine of Rs. 1000/- in default S.I. for six months, and acquitted rest of the respondents, giving rise to the above-numbered three appeals.

4. Mr. R.M.Chauhan, learned A.P.P. submitted that it has been proved by the prosecution that the respondent no.1 had inflicted dharia blows on both the hands of the

deceased,whereas the respondent no.2 had inflicted dharia blows on the legs of the deceased and as the cumulative effect of the injuries caused to the deceased was such that in the ordinary course of nature the death would have ensued, the respondents no.1 & 2 ought to have been convicted of the offence punishable under section 302 I.P.C. According to the learned A.P.P., the evidence of witness Shardaben,witness Manilal and witness Chhatrasinh clinchingly establishes that the acquitted respondents had instigated the respondents no.1 & 2 to kill the deceased and, therefore, all the respondents ought to have been convicted of the offences punishable under sections 147, 148, 149, 302, 504 of I.P.C. and section 135 of the Bombay Police Act. What was claimed by the learned counsel for the State Government was that it is proved by the prosecution by leading cogent and convincing evidence that the respondents no.1 & 2 had caused injuries which were present during the course of postmortem examination and as the injuries collectively were sufficient in the ordinary course of nature to cause death, Clause Thirdly of Section 300 I.P.C. would be attracted to the facts of the present case and, therefore, the acquittal appeal should be accepted. In the alternative, it was pleaded that the punishment imposed for commission of the offence under section 304 Part-I of I.P.C. is inadequate and having regard to the facts of the case, the maximum sentence of life imprisonment provided under section 304 Part-I should be imposed on the convicted respondents. Lastly, it was pleaded that there is no substance in the appeal filed by the convict accused which is directed against their conviction under section 304 Part-I of the Indian Penal Code as well as imposition of sentence and therefore, the same should be dismissed.

5. Mr. Navin Pahwa, learned counsel for the respondents contended that the evidence of witness Shardaben Ganpatbhai, witness Laljibhai Mansing, witness Manilal Kalidas and witness Chhatrasinh Narsinhbhai is full of improbabilities and inconsistencies and, therefore, the same should not have been relied upon by the learned Judge for the purpose of convicting the respondents no.1 & 2 in Criminal Appeal No. 170/97. It was pleaded that a false case was made out by the prosecution against the respondents no.3 to 5 in Criminal Appeal No. 170/97 and, therefore, the whole prosecution case ought to have been disbelieved by the learned Judge. In the alternative, it was argued that it is not proved by the prosecution that the respondents no.1 & 2 had caused injuries to the deceased with the intention of causing his death and, therefore, the case would not fall

under section 300 I.P.C. It was vehemently argued that the prosecution has failed to prove the motive, which is alleged to have prompted the respondents no.1 & 2 to assault the deceased and, therefore, the whole prosecution case becomes doubtful. The learned counsel emphasised that none of the injuries sustained by the deceased can be said to be individually sufficient in the ordinary course of nature to cause death and as the death had taken place because of excessive bleeding, the respondents no.1 & 2, at the best, can be convicted of the offence punishable under section 304 Part-II of the Indian Penal Code. The learned counsel mentioned that none of the respondents no.1 & 2 had inflicted any injury on vital part of the body of the deceased and before the injuries were caused to the deceased a scuffle had taken place between the deceased on one hand and the respondents no.1 & 2 on the other and, therefore, the intention to cause death of the deceased should not be attributed to the respondents no. 1 & 2 because had it been their intention to cause death of the deceased, they would have straightway assaulted the deceased after reaching the place of incident and a scuffle would not have ensued. The learned counsel for the respondents further submitted that two views are possible as to whether the offence committed by the respondents no.1 & 2 would fall under section 300 or would fall under section 304 Part-II of the Indian Penal Code and, therefore, as the view taken by the learned Judge that the offence committed by the respondents no.1 & 2 would be punishable under section 304 Part-I of I.P.C. is not perverse, the same should not be interfered with in the acquittal appeal. Lastly, it was contended that having regard to the facts of the case,the learned Judge was justified in punishing the respondents no.1 & 2 with R.I. for 4 years and no case for enhancement of sentence having been made out, enhancement appeal should be dismissed. In support of his submissions, the learned counsel placed reliance on the decision in Kalinder Bharik v. Himachal Pradesh, AIR 2000 3618.

6. We have considered the submissions advanced at the Bar and reappreciated the whole evidence on record.

7. The fact that deceased Ganpatbhai died a homicidal death is not in dispute at all. The evidence of Dr. Shankerbhai Nanubhai Barot, PW.1 Exh.16 shows that on August 22, 1995 he was serving as a Medical Officer at Umalla Primary Health Centre and that Police Constable Kanaksinh had brought dead body of the deceased with a police yadi for postmortem examination. The doctor has stated that he had started postmortem

examination at about 8.30 A.M. and completed the same at 11.00 A.M. On external examination, the doctor had found six injuries which are mentioned by him in his substantive evidence before the Court. The injuries which were found by the doctor while performing autopsy on the dead body of the deceased, are also mentioned in Column-17 of the postmortem notes produced at Exh.18. Further, the injuries, which were sustained by the deceased, are also mentioned in detail in the inquest panchnama Exh.26. All the four eye witnesses have deposed before the Court that the deceased was assaulted with dharias by the respondents no.1 & 2. It is nobody's case that the injuries sustained by the deceased were either accidental or suicidal or natural. Under the circumstances, we are of the opinion that the learned Judge was justified in coming to the conclusion that it was proved by the prosecution beyond reasonable doubt that the deceased had died a homicidal death. The said finding being eminently just, is hereby upheld.

8. As noticed earlier, the learned Judge has not treated the complaint filed by Shardaben as First Information Report in the case on the ground that the information about the incident was conveyed by Beat Constable Hiralal to P.S.I. Mr. D.H.Rathod on telephone, after which the P.S.I. had gone to the field and recorded the complaint of Shardaben. In this regard, we find that the evidence of P.S.I. Mr.D.H.Rathod shows that initially Beat Constable Hiralal had learnt that a quarrel had taken place at village Bamalla and, therefore, he had gone to village Bamalla from Umalla Police Station. The evidence of Mr. Rathod further shows that after reaching village Bamalla, Beat Constable Hiralal had telephonically informed him that a murder had taken place in village Bamalla. Mr. Rathod in his evidence has stated that he had not made any entry at Umalla Police Station regarding information received by him from Beat Constable Hiralal on telephone. According to him, he had thereafter gone to the place of incident and recorded the complaint as given by Shardaben, which is exhibited by the learned Additional Sessions Judge at Exh.39 in the case. The evidence of witness Shardaben shows that after the incident, she was sitting by the side of dead body of her husband and that as somebody had informed the police, the police personnel had come to the field and her complaint was recorded. We may state that the evidence of P.S.I. Mr. Rathod establishes that Beat Constable Hiralal had learnt that a quarrel had taken place at village Bamalla. However, from this information learnt by Beat Constable Hiralal, one cannot jump to the conclusion that an information regarding commission of a

cognizable offence was laid before Beat Constable Hiralal. Further, as per the case of P.S.I. Mr. Rathod, Beat Constable Hiralal had informed him on telephone that in a quarrel, a murder had taken place at village Bamalla. The evidence of P.S.I. Mr. Rathod does not show that Beat Constable Hiralal had given any particulars about the incident, except stating that in a quarrel, a murder had taken place at village Bamalla. It was never conveyed by the Beat Constable to P.S.I. Mr.Rathod that Ganpatbhai had a quarrel with any of the respondents in Criminal Appeal No. 170/97 or that Ganpatbhai was murdered or that the respondents no.1 & 2 had caused injuries to Ganpatbhai and also caused his death. Thus, it is difficult to conclude that before recording of complaint of Shardaben, disclosure of commission of a cognizable offence was made by any one and, therefore, in our view, the learned Additional Sessions Judge was not justified in not treating the complaint lodged by Shardaben as the First Information Report in the case. The information, which was received by Beat Constable Hiralal regarding quarrel which had taken place at village Bamalla as well as the information conveyed by Beat Constable Hiralal on telephone to P.S.I. Mr.Rathod, were cryptic and lacking in material particulars. Under the circumstances, the learned Judge was not justified in holding that the complaint lodged by Shardaben was hit by the provisions of section 162 of the Code. In our view, the information lodged by Shardaben is rightly exhibited by the learned Judge in the case and the same will have to be treated as F.I.R. in view of the provisions of section 154 of the Code of Criminal Procedure.

9. The evidence of Shardaben Ganpatbhai, PW.2 Exh.21 shows that on the date of the incident her husband in the company of labourer Laljibhai had gone to the field known as Savlivala where cotton crop was grown and that she had taken meals for both of them at about 12.00 noon. She has mentioned in her substantive evidence before the Court that after taking meals, her husband and labourer Laljibhai were working in one part of the field; whereas she was working in another part of the field. What is claimed by her before the Court is that she had seen all the five respondents coming towards the place where her husband was working and as the respondents no.1 & 2 were armed with dharias, she had apprehended that her husband would be assaulted and, therefore, she had rushed to the place where her husband was working, to warn him. According to this witness, the respondents no.1 & 2 had grappled with the deceased and the respondent no.1 had inflicted blows with dharia on both the hands of the

deceased; whereas the respondent no.2 had inflicted dharia blows on the leg of the deceased and other respondents had instigated the respondents no.1 & 2 to kill the deceased. The witness has maintained before the Court that on assault being mounted, she had raised shouts and, therefore, those who were working in the nearby field, had come to the place of the incident. The witness has stated in her deposition that on receipt of injuries, the deceased had fallen down and died within 10 to 15 minutes. Further, the witness has claimed that because somebody had informed the police, police personnel had come to the field where her complaint was recorded. During the course of her examination-in-chief, she identified all the respondents as well as dharias which were used by the respondents no.1 & 2 in commission of offences. In her cross-examination, she denied the suggestion made by the defence that she had not raised shouts when her husband was being assaulted. It was admitted by her that she was working in one part of the field, whereas her husband was working in another part of the field and that it was not possible to see her husband from the place where she was working, but it is relevant to notice that her assertion that on seeing the accused, she had rushed to the place where her husband was working and had warned him, was not challenged by the defence at all. She further admitted in her cross-examination that after grappling was over, immediately the respondents no.1 & 2 had inflicted dharia blows immediately one after another and that as she was threatened to death, she had not intervened in the incident to save her husband. It was asserted by her that she had mentioned the fact that she was threatened with dire consequences and, therefore, she had not intervened in the incident while her statement was being recorded, but, we find that no such fact was stated by her in her complaint. The witness stated during her cross-examination that because of the incident, witness Manilal, Budha Dharma, Chhatrasinh Narsinhbhai etc. had come to the place of incident. It was put to the witness that she had filed a false complaint against the respondents at the instance of one Bhavnaben, who was daughter of a former Minister because the wife of the respondent no.1 had contested election against Bhavnaben, but the witness denied that Bhavnaben had played any role in lodging of complaint against the respondents. Other suggestions which are not relevant, were also denied by the witness. On fair reading of evidence of this witness, it becomes evident that she is the close relative of the deceased. As such no enmity between her on one hand and the respondents on the other is suggested by the defence at all. It could not be established by the defence that she had lodged complaint

against the respondents at the instance of Bhavnaben. She being the wife of the deceased, would not allow the real culprit to go scot free and involve innocent persons falsely in such a serious case. Though she has been cross-examined at length, her testimony could not be shaken. The witness Shardaben has narrated the incident as it had happened. As there are no major improvements or contradictions in her evidence, the same becomes reliable and trustworthy. Under the circumstances, it cannot be said that any error was committed by the learned Judge in placing reliance on the deposition of witness Shardaben for the purpose of coming to the conclusion that the respondents no.1 & 2 were the authors of the injuries sustained by the deceased.

10. Witness Laljibhai Mansing, PW.3, Exh.22 is the labourer, who had gone with the deceased to the field for ploughing the land. He has also stated categorically that at about 2.00 P.M., the respondents no.1 & 2 had come from village side and after grappling with the deceased, had inflicted dharia blows to the deceased. According to this witness, after causing injuries to the deceased, the respondents no.1 & 2 had run away from the place of the incident. During the cross-examination, the witness stated that he was given Rs.15/- a day as well as one time meal by the deceased. The witness admitted that he was on friendly terms with deceased Ganpatbhai, but denied the suggestion made by the defence that the deceased was a habitual drunkard and that he had consumed liquor on the date of the incident. Certain questions were put to the witness by the Court and in answer to one of the questions, the witness asserted that he had seen the incident from the distance of 10 ft. The witness admitted that he had not raised any shouts when the incident had taken place, nor had tried to run away and that the assault mounted by the respondents no.1 & 2 on the deceased had continued for a period of about 5 minutes. This witness further denied the suggestion made by the defence that he had advised Shardaben to file the complaint and that he was deposing falsely against the respondents no.1 & 2 because of his relations with deceased Ganpatbhai. On reappreciation of evidence of this witness, we find that the witness stands fully corroborated by the evidence of witness Shardaben. He being an agricultural labourer, his presence with the deceased who was cultivating the field on share basis, is natural. It was not suggested to him that he had any enmity with the respondents no.1 & 2. Under the circumstances, there was no earthly reason for him to depose before the Court and assert that the respondents no.1 & 2 had inflicted dharia blows on the deceased. His

evidence being trustworthy, deserves to be accepted by the Court.

Again, witness Manilal Kalidas, PW.4 Exh.23 has stated in his evidence that deceased Ganpatbhai was staying in his village and that his field is situated near the field of deceased Ganpatbhai. According to this witness, at the time of incident he was working in his field and that he had seen that deceased Ganpatbhai in the company of Laljibhai was working in one part of the field, whereas Shardaben,wife of deceased Ganpatbhai was working in another part of the field. We may state that the learned Judge while recording the evidence of this witness has observed his demeanour and recorded that before the answer could be typed out, the witness was uttering the whole sentence and this indicated that he was stating the fact before the Court which he had memorized. So far as this observation is concerned, we find that merely because the witness was stating the whole sentence before part of it was typed out, one cannot jump to the conclusion that he was stating the fact which was memorized by him. That was a way of deposing before the Court and would hardly be relevant regarding which a note could have been made. This witness has further stated in his deposition that all the five respondents in Criminal Appeal No.170/97 had come to the place where the deceased was working and at that time the respondents no.1 & 2 were armed with dharias. According to this witness, a scuffle had taken place between the deceased and the respondents no.1 & 2, after which the respondents no.1 & 2 had given dharia blows in succession to the deceased. The witness has clearly stated that the deceased had died on the spot and that Chhatrasinh Narsinhbhai, Shardaben Ganpatbhai and Laljibhai had reached near the place of incident and found the deceased dead. In his cross-examination the witness denied the suggestion made by the defence that it was not possible for him to see the incident while he was working in his field. Further, in cross-examination, the witness maintained that he had seen the respondents coming to the place where the deceased was working from a distance of about 200 to 300 feet and that the respondents no.1 & 2 were shouting filthy language loudly. The witness admitted that when grappling was going on, he had not intervened, nor raised any shouts. The witness also denied the suggestion made by the defence that the respondent no.1 had given deposition against him in a case between him and one Shekhji and, therefore, he was deposing falsely against the respondent no.1. According to this witness, he had stayed in the field for a period of about four hours after the incident

and he had informed Bhavnaben about the incident. On overall appreciation of evidence of this witness, it becomes manifest atonce that the field of this witness is situated near the field of the deceased and that he had ample opportunity of witnessing the incident in question. No major contradictions with previous police statement are brought out on record of the case, nor it is demonstrated that he had made material improvement in his deposition before the Court. This witness has also no enmity with any of the respondents and, therefore, there was no reason for him to give false deposition against any of them. Further, the evidence of this witness stands corroborated by the evidence of two other eye witnesses, namely, Shardaben Ganpatbhai and Laljibhai Mansingbhai. Under the circumstances, we find that the learned Judge did not commit any error in placing reliance on the deposition of this witness for the purpose of coming to the conclusion that the respondents no.1 & 2 had inflicted dharia blows on the deceased.

The prosecution has also relied upon the evidence of witness Chhatrasinh Narsinhbhai, PW.5 Exh.24 to prove its case against the respondents. However, para-26 of the judgment which is impugned in the acquittal appeal, shows that the learned Additional Sessions Judge has not placed reliance on the deposition of this witness. We have gone through the evidence of this witness and we are of the opinion that the learned Judge was justified in not placing reliance on the deposition of this witness while discussing the evidence of the prosecution witnesses.

11. The above discussion would indicate that the prosecution has proved beyond reasonable doubt that the respondents no.1 & 2 had inflicted dharia blows on the hands and legs of the deceased. This brings us to the question as to which offence is committed by the respondents no.1 & 2. As noticed earlier, the learned Additional Sessions Judge has taken the view that no injury was inflicted by any of the respondents no.1 & 2 on the vital part of the body of the deceased and as the injury was not caused with an intention to cause death of the deceased, the offence would be one punishable under Part-I of Section 304 I.P.C. In this regard, it would be relevant to notice the medical evidence on record. The evidence of Dr. Shankerbhai Barot, who had performed autopsy on the dead body of the deceased, would indicate that on examination he had found following injuries :-

(1) Vertical incised wound on the anti aspect of the deltoid region of the left upper arm size- 1' x

1/2' breath x 1/4' depth. No active bleeding. Blood clot present (red colour). Muscle and vessel are cut down. NAD.

(2) Incised wound on the posterior aspect of the upper 1/3 of the right fore-arm below the elbow joint. Size 4'x2'x2' depth. No active bleeding.

(3) Incised wound on the dorsal aspect of right wrist including hand. Size 5'x2 1/2'x1/2' depth. Muscle & tender & meta carpal bone of finger were exposed. No active bleeding. Blood clot present (read colour).

(4) Incised wound on the inner aspect of the right knee and upper 1/3 of the leg. Size 6'x4'x4' depth. No active bleeding. Blood clot present (read colour). Muscle were cut down threw exposing the leg bone, through this wound the approximately 1/3rd portion of tibia & fibula bone were fractured. Fracture of end of the bone were clean- cut & sharp.

(5) Incised wound on the back of the left ankle. Size 1'x 1/2' x 1/2'.

(6) Incised wound on the lower 1/3 of the left leg Size 1' x 1/2' x 1/2'. Blood clot present (red colour).

12. The doctor in para-2 of his substantive evidence has clearly stated that the death had ensued because of excessive bleeding resulting from external injuries and shock. In para-3 of the deposition, the doctor has mentioned that all the injuries were possible by dharias which were produced in the case as muddamal articles. Again, in para-3, the doctor has asserted that because of excessive bleeding the deceased had died. In cross-examination, the doctor admitted that individually each injury was not sufficient to cause death of the deceased in normal course. The doctor also admitted that if the muscle and vessels were not cut, death would not have ensued. The witness categorically denied the suggestion made by the defence that Injury no.1 which had cut muscle and vessel was not sufficient to cause death. The doctor further admitted that if 1/3rd of the total arteries in the body are cut, then death is possible and that he has not mentioned in his postmortem notes as to whether any artery was cut or not. The witness also admitted that if a person was suffering from haemophillia (a severe hereditary bleeding disease affecting males and transmitted by females), there would be continuous bleeding from the injury and that blood clotting would not take place. The witness also admitted that if there is stoppage of supply of oxygen to the brain, death would occur because of shock. The witness informed the Court

that rigor mortis was present all over the dead body when he had started postmortem examination of the body of the deceased. He gave an opinion that injury on the legs might have been caused to the deceased after he had fallen down on the ground. The witness also informed the Court that having regard to the injuries sustained by the deceased, he must have expired within 10 to 15 minutes. The analysis of the evidence of the doctor indicates that the injuries caused to the deceased were collectively sufficient in the ordinary course of nature to cause his death. Though it was suggested to the doctor that the deceased was suffering from haemophillia, it could not be established that the deceased was in fact suffering from the said disease. Further, the effect of such disease would be that blood clotting would not take place, but the postmortem examination indicates that blood clots were present where injuries were caused. In State of Andhra Pradesh v. Rayavarapu Punnayya and another, AIR 1977 SC 45, the Supreme Court has explained the distinction between murder and culpable homicide not amounting to murder. The Supreme Court has held that the intention to cause death is not an essential requirement of clause (2) and only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim is sufficient to bring the killing within the ambit of clause (2) of section 300. Further it is explained that clause (b) of section 299 does not postulate any such knowledge on the part of the offender and instances of cases falling under clause (2) of section 300 can be where the assailant causes death by a fist blow intentionally given knowing that the victim is suffering from an enlarged liver or enlarged spleen or diseased heart and such blow is likely to cause death of that particular person as a result of the rupture of the liver or spleen or the failure of the heart, as the case may be. According to the Supreme Court,if the assailants had no such knowledge about the disease or special frailty of the victim,nor an intention to cause death or bodily injury sufficient in the ordinary course of nature to cause death, the offence will not be murder, even if the injury which caused the death, was intentionally given. While interpreting clause (3) of Section 300, what is ruled by the Supreme Court is that in clause (3) of Section 300, instead of the words 'likely to cause death' occurring in the corresponding clause (b) of Section 299, the words, "sufficient in the ordinary course of nature" have been used and obviously, the distinction lies between a bodily injury likely to cause death and a bodily injury sufficient in the ordinary course of nature to cause death. The Supreme Court has

laid down the proposition of law that for cases to fall within clause (3), it is not necessary that the offender intended to cause death,so long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature. While laying down the above proposition of law, the Supreme Court placed reliance on earlier decisions rendered in (i) Virsa Singh v. State of Punjab, 1958 SCR 1495, and (ii) Rajwant v. State of Karala, A.I.R. 1966 SC 1874. In Kishan v. The State of Madhya Pradesh, (1974) 3 SCC 623, the appellant and his co.accused had gone to the house of Bucha with the intention of causing physical harm to him. They had gone unarmed to his house and, therefore, they had no intention to kill him. Bucha had picked-up a khutai and inflicted deadly blows on the head of Har Charan, a brother of the appellant. Har Charan had fallen down and become unconscious. At that time, the appellant had hurled the khutai on the head of Bucha. The blow was so severe that there was profuse bleeding inside the brain. Dr. Banerji, who had performed the autopsy on the dead body, had deposed, "With these injuries death was inevitable". The Supreme Court has held that in view of the medical opinion, the case would fall within the purview of section 300, third clause and therefore, the High Court was right in convicting the appellant under section 302 I.P.C. Again, explaining the scope of section 302 as well as that of section 304 Part-II of I.P.C., the Supreme Court in Bakhtawar and another v. State of Haryana, (1979)4 SCC 698, has held that where the accused intentionally caused the injuries and such injuries were sufficient in the ordinary course of nature to cause death, the case would fall under section 300 thirdly and offence punishable would be one under section 302 of I.P.C. For application of clause Third Section 300, it is not necessary for the prosecution to prove that it was the intention to inflict injury which in the ordinary course of nature was sufficient to cause death. What is required to be proved by the prosecution is that particular injury/injuries were caused and that injury or injuries were sufficient in the ordinary course of nature to cause death. If causing of injury is proved and if it is established by the medical evidence that the injuries were sufficient in the ordinary course of nature to cause death, then the offence punishable would be one under section 302 I.P.C. and not under section 304 Part-I or Part-II of I.P.C. The evidence on record clearly establishes that the injuries which were caused by the respondents no.1 & 2 on the hands and legs of the deceased were not accidental. It is not the case of any of the respondents no.1 & 2 that the blow was aimed on some other part of the body

and because of supervening cause like sudden intervention of someone or movement of the deceased, dharia had struck on the hands and legs of the deceased. There is no manner of doubt that it was the intention of the respondents no.1 & 2 to cause those injuries on the hands and legs of the deceased which were ultimately found by the doctor while performing postmortem examination. Therefore, the learned Additional Sessions Judge was not justified in coming to the conclusion that the respondents no.1 & 2 had not committed offence punishable under section 302 I.P.C., but had committed offence punishable under Part-I of Section 304 I.P.C. Here, in this case, the learned Additional Sessions Judge has misconstrued the provisions of sections 300 & 304 Part-I of the Indian Penal Code, though they have been clearly interpreted by the Supreme Court from time to time. In Kalinder Bharik (supra), nine injuries were noticed on the deceased. It was found that all the internal organs were found normal and the skull was also found normal. The doctor had opined in the said case that the death could be due to excessive bleeding. The Supreme Court, as a matter of fact, found that none of the injuries were either individually or collectively sufficient in the ordinary course of nature to cause death and as the death had ensued because of excessive bleeding, the conviction of the appellant was altered to one under section 304 Part-II from section 302 I.P.C. So far as the facts of the present case are concerned, the evidence of the Medical Officer clearly establishes that the injuries sustained by the deceased collectively were sufficient in the ordinary course of nature to cause his death and, therefore, in our view, the principle laid down by the Supreme Court in the above quoted decision is not applicable to the facts of the present case and no benefit can be given to the respondents no.1 & 2 on the basis of the principle laid down in the said decision. We notice that the learned Additional Sessions Judge has believed the evidence of three witnesses whose testimonies were found to be reliable, trustworthy and inspiring confidence. This is not a case where the evidence is disbelieved by the Trial Court and different view of the matter is sought to be taken by the Appellate Court even if two view are possible. The learned Additional Sessions Judge has misconstrued the provisions of section 300 and wrongly convicted the respondents no.1 & 2 of the offence punishable under section 304 Part-I of the Indian Penal Code, though they are liable to be convicted of the offence punishable under section 302 I.P.C. Thus, no benefit can be given to the respondents no.1 & 2 on the plea that two views of the matter are possible. In our opinion, two views of the matter are

not possible at all having regard to the principles of law enunciated by the Supreme Court from time to time and it will have to be held that the respondents no.1 & 2 are liable to be convicted of the offence punishable under section 302 of the Indian Penal Code. Thus, the acquittal appeal against the respondents no.1 & 2 will have to be accepted.

13. So far as acquittal of the respondents no.3 to 5 is concerned, we find that the case of Shardaben and others that they had instigated the respondents no.1 & 2 to kill the deceased, does not get corroboration from the evidence of witness Laljibhai. It is relevant to notice that witness Laljibhai was an agricultural labourer and was working in the field with the deceased. If the respondents no.3 to 5 or any of them had instigated the respondents no.1 & 2 to kill the deceased, he would not have failed to mention the said fact in his deposition before the Court. Further, it is not the intention of the legislature in enacting Section 149 to render every member of an unlawful assembly liable to punishment for every offence committed by one or more of its members. In order to invoke section 149, it must be shown that the incriminating act was done to accomplish the common object of the unlawful assembly. Even if an act incidental to the common object is committed to accomplish the common object of the unlawful assembly, it must be within the knowledge of other members as one likely to be committed in prosecution of the common object. The evidence on record does not establish that any of the respondents no.3 to 5 knew or were aware of the likelihood of a particular offence being committed by the respondents no.1 & 2. Therefore, in our view, the learned Additional Sessions Judge was justified in holding that section 149 I.P.C. had no application to the facts of the present case. The acquittal of the respondents no.3 to 5 is well-founded and the learned Additional Public Prosecutor has failed to dislodge the reasons recorded by the learned Additional Sessions Judge for acquitting the respondents no.3 to 5 and persuade us to take a different view than already taken by the learned Additional Sessions Judge. Therefore, the acquittal appeal filed against the respondents no.3 to 5 is liable to be dismissed.

14. As we are inclined to accept the acquittal appeal against the respondents no.1 & 2 and convict them of the offence punishable under section 302 of the Indian Penal Code, Criminal Appeal No. 169/97, which is filed for enhancement of sentence imposed on the respondents no.1 & 2, has become infructuous and deserves to be disposed of

accordingly.

15. For the foregoing reasons, Criminal Appeal No. 170/97 succeeds in part. It is held that the respondents no.1 & 2 in Criminal Appeal No.170/97 have committed offence punishable under section 302 of the Indian Penal Code by causing death of deceased Ganpatbhai and they are sentenced to suffer R.I. for life. Criminal Appeal No. 170/97 is dismissed so far as the respondents no.3 to 5 are concerned. Criminal Appeal No.169/97, which is filed for enhancement of sentence, has become infructuous and is disposed of accordingly. As we have held that the prosecution has proved beyond reasonable doubt that the respondents no.1 & 2 had caused death of the deceased by means of inflicting dharia blows, Criminal Appeal No.625/97 filed by them against their conviction under section 304 Part-I of the Indian Penal Code as well as imposition of sentence, cannot be entertained and, therefore, the same is also dismissed. Muddamal to be disposed of in terms of directions given by the learned Judge in the impugned judgment.

The learned counsel for the respondents states at the Bar that the respondents no.1 & 2 have already undergone the sentence which was imposed on them by the learned Additional Sessions Judge while convicting them under section 304 Part-I read with section 34 of I.P.C. Having regard to the facts of the case, the respondents no.1 & 2 are directed to surrender to the jail authorities on or before March 18, 2002.

(J.M.Panchal, J.)

(J. R. Vora, J.)

(patel)